Supreme Court, U.S.
FILED

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No.

In The

Supreme Court of the United States

October Term, 1997

MELANIE SATTERFIELD,

Petitioner.

vs.

WAL-MART STORES, INC.

Respondent.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit

PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED

1. Whether an employee seeking unforeseeable leave under the Family and Medical Leave Act of 1993 ("FMLA") is required as an initial matter to notify her employer of anything other than leave is needed.

2. Whether an employee who has notified her employer of her need to take unforeseeable FMLA leave can be fired by her employer on the onset day of the employee's illness even though the employer has made no effort to obtain additional information on the employee's illness through informal means and even though the employee's illness subsequently develops into a serious health condition within the meaning of the FMLA.

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In The

Supreme Court of the United States

October Term, 1997

No. 98-_____

Melanie Satterfield,
Petitioner.,

vs.

Wal-Mart Stores, Inc.

Petition for a Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit

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PETITION FOR A WRIT OF CERTIORARI

Melanie Satterfield hereby petitions this Court for a writ of certiorari to be issued to the United States Court of Appeals for the Fifth Circuit.

OPINIONS BELOW

The opinion of the United States Court of Appeals for the Fifth Circuit (Appendix) is reported at 135 F.3d 973 (5th Cir. 1998). The district court rendered no opinion in this case.

JURISDICTION

The Court of Appeals issued its opinion and judgment on February 25, 1998, issued a revised opinion on March 17, 1998, and denied rehearing on March 25, 1998. Accordingly, this petition is filed within the time allowed by law. The jurisdiction of this Court is invoked under 28 U.S.C. §1254(1).

STATUTES AND REGULATIONS INVOLVED

29 U.S.C. §2612. Leave requirement.

(a) In general. (1) Entitlement to leave. Subject to section 103 [29 USCS §2613], an eligible employee shall be entitled to a total of 12 workweeks of leave during any 12-month period for one or more of the following:

* * * * *

(D) Because of a serious health condition that makes the employee unable to perform the functions of the position of such employee.

29 C.F.R. §825.100(a)

(a) The Family and Medical Leave Act of 1993 (FMLA or Act) allows "eligible" employees of a covered employer to take job-protected, unpaid, leave, or to substitute appropriate paid leave if the employee has earned or accrued it, for up to a total of 12 workweeks in any 12 months because of the birth of a child and to care for the newborn child, because of the placement of a child with the employee for adoption or foster care, because the employee is needed to care for a family member (child, spouse, or parent) with a

serious health condition, or because the employee's own serious health condition makes the employee unable to perform the functions of his or her job (see §825.306(b)(4)). In certain cases, this leave may be taken on an intermittent basis rather than all at once, or the employee may work a part-time schedule. (As amended, eff. March 30, 1995)

29 C.F.R. §825.114(a)(2)(i)(A)

(a) For purposes of FMLA, "serious health condition" entitling an employee to FMLA leave means an illness, injury, impairment, or physical or mental condition that involves:

* * * * *

(2) *Continuing treatment* by a health care provider. A serious health condition involving continuing treatment by a health care provider includes any one or more of the following:

(i) A period of *incapacity (i.e.,* inability to work, attend school or perform other regular daily activities due to the serious health condition, treatment therefor, or recovery therefrom) of more than three consecutive calendar days, and any subsequent treatment or period of incapacity relating to the same condition, that also involves:

(A) Treatment two or more times by a health care provider, by a nurse or physician's assistant under direct supervision of a health care provider, or by a provider of health care services (*e.g.,* physical therapist) under orders of, or on referral by, a health care provider; or . . .

29 C.F.R. §825.220(c)

(c) An employer is prohibited from discriminating against employees or prospective employees who have used FMLA leave. For example, if an employee on leave without pay would otherwise be entitled to full benefits (other than health benefits), the same benefits would be required to be provided to an employee on unpaid FMLA leave. By the same token, employers cannot use the taking of FMLA leave as a negative factor in employment actions, such as hiring, promotions or disciplinary actions; nor can FMLA leave be counted under "no fault" attendance policies.

29 C.F.R. §825.302(a) and (b)

(a) An employee must provide the employer at least 30 days advance notice before FMLA leave is to begin if the need for the leave is foreseeable based on an expected birth, placement for adoption or foster care, or planned medical treatment for a serious health condition of the employee or of a family member. If 30 days notice is not practicable, such as because of a lack of knowledge of approximately when leave will be required to begin, a change in circumstances, or a medical emergency, notice must be given as soon as practicable. For example, an employee's health condition may require leave to commence earlier than anticipated before the birth of a child. Similarly, little opportunity for notice may be given before placement for adoption. Whether the leave is to be continuous or is to be taken intermittently or on a reduced schedule basis, notice need only be given one time, but the

employee shall advise the employer as soon as practicable if dates of scheduled leave change or are extended, or were initially unknown.

(b) "As soon as practicable" means as soon as both possible and practical, taking into account all of the facts and circumstances in the individual case. For foreseeable leave where it is not possible to give as much as 30 days notice, "as soon as practicable" ordinarily would mean at least verbal notification to the employer within one or two business days of when the need for leave becomes known to the employee.

29 C.F.R. §825.303(a) and (b)

(a) When the approximate timing of the need for leave is not foreseeable, an employee should give notice to the employer of the need for FMLA leave as soon as practicable under the facts and circumstances of the particular case. It is expected that an employee will give notice to the employer within no more than one or two working days of leaving of the need for leave, except in extraordinary circumstances where such notice is not feasible. In the case of a medical emergency requiring leave because of an employee's own serious health condition or to care for a family member with a serious health condition, written advance notice pursuant to an employer's internal rules and procedures may not be required when FMLA leave is involved.

(b) The employee should provide notice to the employer either in person or by telephone, telegraph, facsimile ("fax") machine or other electronic means.

Notice may be given by the employee's spokesperson (*e.g.*, spouse, adult family member or other responsible party) if the employee is unable to do so personally. The employee need not expressly assert rights under the FMLA or even mention the FMLA, but may only state that leave is needed. The employer will be expected to obtain additional required information through informal means. The employee or spokesperson will be expected to provide more information when it can readily be accomplished as a practical matter, taking into consideration the exigencies of the situation.

29 C.F.R. §825.305(a) and (c)

(a)An employer may require that an employee's leave to care for the employee's seriously-ill spouse, son, daughter, or parent, or due to the employee's own serious health condition that makes the employee unable to perform one or more of the essential functions of the employee's position, be supported by a certification issued by the health care provider of the employee or the employee's ill family member. An employer must give notice of a requirement for medical certification each time a certification is required; such notice must be written notice whenever required by §825.301. An employer's oral request to an employee to furnish any subsequent medical certification is sufficient.

*****

(c) In most cases, the employer should request that an employee furnish certification from a health care

provider at the time the employee gives notice of the need for leave or within two business days thereafter, or, in the case of unforeseen leave, within two business days after the leave commences. The employer may request certification at some later date if the employer later has reason to question the appropriateness of the leave or its duration.

STATEMENT

In June of 1995, Melanie Satterfield ("Satterfield") was employed as a cashier at Wal-Mart's store in New Boston, Texas ("the store"). Satterfield's mother, Jean Grimes ("Grimes"), also worked at the store. Satterfield was scheduled to work at the store on Friday, June 16, 1995.

When Satterfield woke on the morning of June 16, 1995, she was having a lot of pain in her right side. She had never had this pain before, did not know what was causing it, and did not know how long it was going to last. Satterfield was unable to go to work on June 16, 1995, because of her pain.

Satterfield did not have a telephone at her home at the time and could not telephone the store to notify the store manager of her upcoming absence from work. In lieu of calling the store, she decided to write a note to the store and ask Grimes to deliver same.

In her note, Satterfield wrote she was in pain, was not going to be able to come to work that date, and asked if she could make up the absence on one of her future days off. Satterfield did not state in her note when she would be returning to work because she did not know this on June 16, 1995.

Grimes read Satterfield's note and agrees that the contents of the note were as stated by Satterfield. Grimes delivered the note to the store on the morning of June 16, 1995. Mark Neighbors, the manager of the store, acknowledges that he received Satterfield's note on June 16, 1995. He threw the note away.

Satterfield continued to be in pain on June 16, 1995, to the point that she felt she needed to see a doctor. On the afternoon of June 16, 1995, she drove to a nearby convenience store and telephoned her doctor in New Boston, Dr. R. S. Gurav. Dr. Gurav was unable to see her that day but made her an appointment for Tuesday, June 20, 1995. This was as soon as Dr. Gurav could see her.

Grimes and Neighbors had a conversation about Satterfield at the store on June 16, 1995, in which Grimes told Neighbors about the pain Satterfield was having but stated that she did not know what was wrong with Satterfield.

Neighbors fired Satterfield on June 16, 1995, because she failed to report to work that day. Although Neighbors may have had in mind previous work absences of Satterfield when he fired her on June 16, 1995, it is undisputed that he fired her because of her work absence on June 16, 1995, not because of previous work absences.

Between June 16, 1995, and June 20, 1995, Satterfield remained at home in bed.

On June 20, 1995, Satterfield went to see Dr. Gurav at his office. Dr. Gurav prescribed pain pills and antibiotics for Satterfield's pain.

Dr. Gurav gave Satterfield a written medical excuse on June 20, 1995, in which he stated that Satterfield was under

his care and should be excused from work. Grimes delivered this excuse to the store on the same day it was written.

Satterfield continued to have pain in her side after seeing Dr. Gurav on June 20, 1995. On the night of June 27, 1995, the pain became so severe she had to seek treatment for it at the emergency room of the New Boston Hospital. She saw Dr. Gurav in the emergency room, was given a pain injection, and was told by Dr. Gurav to report to the hospital the next day for exploratory surgery to determine the cause of her pain. She was discharged from the emergency room early in the morning on June 28, 1995.

Dr. Gurav gave Satterfield a written medical excuse when he discharged her from the emergency room in the early morning on June 28, 1995. The excuse stated that Satterfield "has been under [Dr. Gurav's] care from 6/20/95 to date and is able to return to work on: indefinite." Grimes delivered this excuse to the store on June 28, 1995.

Satterfield reported to the New Boston Hospital as directed by Dr. Gurav on the morning of June 28, 1995. When Satterfield attempted to be admitted to the hospital for the surgery and a check was made on her medical insurance, she was advised by the hospital staff that her medical insurance through Wal-Mart had been canceled because she had been fired and that she could not be admitted to the hospital unless she was prepared to pay the hospital costs herself. This was Satterfield's first knowledge that she had been fired by Wal-Mart. She had to cancel her exploratory surgery scheduled for that day because she could not afford to pay the hospital costs.

After the incident at the hospital, Satterfield called Mark Neighbors at the store. She told him of her health condition, that she was supposed to have surgery for her condition but could not do so because her Wal-Mart medical insurance had been canceled, and asked for Neighbors' help. Neighbors acknowledges receiving this call and that the contents of the call were as stated by Satterfield. Neighbors told Satterfield that she was no longer employed by Wal-Mart and that there was nothing he could do for her.

Subsequent to June 28, 1995, Satterfield continued to have pain and still could not stand for long periods of time. On July 4, 1995, and again on July 10, 1995, she had to seek treatment for the pain in the emergency room of the New Boston Hospital. On both occasions, she saw Dr. Gurav and was given pain injections.

On August 8, 1995, Satterfield wrote the following letter to Terry Pharr, Wal-Mart's District Manager:

> My name is Melanie D. Satterfield, I've been with Wal Marts (sic) for 2-1/2 yrs. Mark Neighbors fired me while I was under Dr. R. S. Gurav's care. I had insurance through Wal Marts (sic) and it was cut off before Dr. Gurav could do surgery on me, Even (sic) though they took the full amount of money for insurance out of my last paycheck. I have spoken with an attorney who said I should have been covered by the Family and Medical Leave Act. He says I have a claim. All I wanted was to have surgery so I could stop hurting and get well so I could come back to work. But I was Fired (sic) for being sick. Please give this situation your full attention.

Pharr received this letter and requested his secretary to look into the matter. Upon learning that Satterfield did not see Dr. Gurav until June 20, 1995, after she was fired, Pharr concluded that Neighbors had acted correctly in firing Satterfield and that no further investigation of the matter was warranted. Pharr never even responded to Satterfield's letter of August 8, 1995.

Satterfield continued to have problems with her pain. She had to seek treatment for it at the emergency room of the New Boston Hospital on September 16, 1995, and on February 18, 1996.

In April of 1996, Satterfield qualified for Medicaid medical assistance. This enabled her to have the surgery Dr. Gurav had recommended that she have on June 28, 1995. Dr. Gurav performed this surgery on April 3, 1996. Dr. Gurav's postoperative diagnosis of Satterfield was "pelvic congestion syndrome or varicosity of broad ligament." Dr. Gurav performed a D & C on Satterfield to resolve this problem.

Satterfield's pain ceased immediately after her surgery on April 3, 1996. Within two weeks after the surgery, she was on her feet and able to work.

Satterfield never received any correspondence, inquiries, or directives of any sort from Wal-Mart on June 16, 1995, or at any time subsequent thereto.

Satterfield brought this action against Wal-Mart in the United States District Court for the Eastern District of Texas, Texarkana Division, claiming that she was fired from the employ of Wal-Mart on June 16, 1995, in violation of her rights under the FMLA. Jurisdiction in the district court was based on 28 U.S.C. §1331.

The district court submitted the case to the jury on the issues of whether Wal-Mart's termination of Satterfield constituted a violation of the FMLA and, if so, what were Satterfield's damages. Based on the provisions of 29 C.F.R. §825.303, the jury was instructed in part as follows:

> An employee must give the employer notice of the employee's need to take Family and Medical Leave Act leave.
>
> ******
>
> The employee need not expressly assert rights under the Family and Medical Leave Act or even mention the Family and Medical Leave Act, but may only state that leave is needed. The employer will be expected to obtain any additional required information through informal means . . ."

The jury found in favor of Satterfield on the liability issue and awarded her actual damages in the amount of $5,000.00. As a result of post-verdict motions filed by Satterfield, the district court increased Satterfield's actual damages award from $5,000.00 to $9,745.00; awarded Satterfield liquidated damages in the amount of $10,719.00; and awarded Satterfield attorney's fees in the amount of $28,577.43. Additionally, the district court ordered Satterfield reinstated in Wal-Mart's employ.

The district court entered a final judgment in the subject case embodying the above relief granted by the jury and the court. Wal-Mart appealed. The Court of Appeals reversed and rendered holding that as a matter of law Satterfield gave

inadequate notice of her need to take unforeseeable leave under the FMLA and that Satterfield was not, therefore, entitled to the protection of the FMLA.

REASONS FOR GRANTING THE PETITION

I.

THE COURT OF APPEALS DECIDED IMPORTANT QUESTIONS OF FEDERAL LAW WHICH HAVE NOT BEEN, BUT SHOULD BE, SETTLED BY THIS COURT.

The FMLA allows eligible employees of a covered employer to take job-protected unpaid leave for up to a total of 12 workweeks in any 12 months because, *inter alia,* the employee's own serious health condition makes the employee unable to perform the functions of his or her job. 29 U.S.C. §2612(a)(1)(D); 29 C.F.R. §825.100(a).

Employee leave under the FMLA is either "foreseeable" leave or "unforeseeable" leave. Each category of leave has distinct notice requirements in terms of timing and content. The notice requirements are as follows:

Foreseeable leave

Timing of notice: Employees who know they will need time off in the future "must" inform the employer of this need at least 30 days in advance, or as soon as practicable. 29 C.F.R. §825.302(a).

Content of notice: The employee "must provide at least verbal notice sufficient to make the employer aware that the employee needs FMLA-qualifying leave, and the anticipated time and duration of the leave." 29 C.F.R. §825.302(c).

Unforeseeable leave

Timing of notice: Notice "should" be given as soon as practicable under the circumstances, and "[i]t is expected that an employee will give notice to the employer within no more than one or two working days of learning of the need for leave." 29 C.F.R. §825.303(a).

Content of notice: "The employee need not expressly assert rights under the FMLA or even mention the FMLA, but may only state that leave is needed. The employer will be expected to obtain any additional required information through informal means." 29 C.F.R. §825.303(b).

As to the content of the notice, striking differences exist between foreseeable and unforeseeable leave. An employee desiring foreseeable leave because of her own serious health condition must make it clear to her employer that the requested leave is for an FMLA-qualifying "serious health condition " whereas an employee requesting unforeseeable leave need "only state that leave is needed." The standard for notice of unforeseeable leave is clearly much less demanding than for foreseeable leave.

When considered in the context of unforeseeable leave, the requirement of 29 C.F.R. §825.303(b) that the notice "only state that leave is needed" makes very good sense for two reasons.

First of all, many of the employees who need unforeseeable leave will, like Satterfield in the subject case, be faced with the sudden and unexpected onset of sickness incapacitating them from work. Unless these employees happen to be physicians, they, like Satterfield, are not going to know what the nature of their sickness is nor how long

their sickness will last. If they are like most people (including Satterfield), these employees will not have instant access to a physician who can tell them what the nature of their sickness is and how long their sickness will last. Thus, when these employees notify their employers of their need to take unforeseeable leave on account of their sickness, on the onset day of their sickness, there is little they can tell their employers other than they are sick and cannot report for work. If, like the Court of Appeals did to Satterfield, these employees are required to furnish more information than this to their employers to qualify for FMLA unforeseeable leave, these employees are being saddled with a burden of production that is factually impossible for them to meet.

Secondly, if these same employees are required to furnish additional information to their employers on the onset day of the employee's sickness such as information that the employee has an FMLA-qualifying serious health condition, these employees may very well be saddled with a burden of production that is legally impossible for them to meet. "Serious health condition" is a term of art under the FMLA. In many instances, an employee (like Satterfield) may not be deemed to have a "serious health condition" under the FMLA unless she has had "a period of incapacity" of more than three consecutive calendar days and has been treated "two or more times by a health care provider." 29 C.F.R. §825.114(a)(2)(i)(A). Under this scenario, it cannot be known on the onset day of the employee's sickness whether the employee has a "serious health condition." How then can the employee (such as Satterfield) provide the employer

on the onset day of the employee's sickness information that she has an FMLA-qualifying serious health condition?

As the basis for its holding that the notice given by Satterfield of her need to take unforeseeable leave was inadequate as a matter of law, the Court of Appeals concluded that Satterfield was required to, but did not, give notice to Wal-Mart that was "sufficient to reasonably apprise [Wal-Mart] of [her] request to take off for a serious health condition." In reaching this conclusion, the Court of Appeals obviously confused notice of the need to take foreseeable leave with notice of the need to take unforeseeable leave and applied the former when it should have applied the latter. Yet, barring intervention by this Court, this erroneous application of the law will now control all workers in Texas, Louisiana, and Mississippi seeking unforeseeable leave under the FMLA.

As noted by the Court of Appeals, the note Satterfield sent to Wal-Mart on June 16, 1995, notified Wal-Mart that she was having a lot of pain and that she would not make it in to work that day. Although the Court of Appeals incorrectly suggests otherwise, this was all that Satterfield knew about her condition at any time on June 16, 1995. Whether or not Satterfield's note satisfies the content requirement for foreseeable leave, the note easily satisfies the minimal content requirement for unforeseeable leave. The content of the note, i.e., I am sick and need to be off work today, is semantically indistinguishable from the minimal regulatory admonition that the notice "only state that leave is needed."

Wal-Mart jumped the gun when it fired Satterfield on the onset day of her illness without utilizing the clarification and certification process provided in the FMLA and applicable regulations. If store manager Mark Neighbors believed Satterfield's notice was inadequate, he should have done as he was "expected" to do and obtained "additional required information through informal means." 29 C.F.R. §825.303(b). In addition, Neighbors could and "should" have requested that Satterfield "furnish certification from a health care provider . . . within two business days" after Satterfield's leave commenced. 29 C.F.R. §825.305(c). Had Wal-Mart utilized this clarification and certification process instead of firing Satterfield, it could have protected itself against possible abuse of FMLA leave while at the same time, avoided violating Satterfield's leave rights under the FMLA.

For unforeseeable leave, the Department of Labor regulations accept the reality that the true nature of the illness may not be known immediately. Contrary to the assertion of the Court of Appeals, it would have made no possible difference whether Satterfield had spoken at length with Neighbors on the onset day of her illness, which was also the day she was fired. On that day, neither Satterfield nor Neighbors could have known that her illness would develop into an FMLA-qualifying serious health condition. On the onset day of an illness, most employees will only know that leave is needed that day, and the Department of Labor regulations sensibly refrain from requiring more.

In deciding that Satterfield's notice of her need to take unforeseeable leave was inadequate as a matter of law and

that Satterfield was subject to discharge on the onset day of her illness, the Court of Appeals decided two important questions of FMLA law which have not been, but should be, settled by this Court. The importance of these two questions of FMLA law can best be illustrated by imagining the following situation. An employee wakes up with a pain in her side. The employee has never had the pain before, does not know what is causing it nor how long it is going to last. The employee honestly and innocently informs her employer that she will not be at work that day because of the pain. The employer fires the employee that same day before anyone can tell whether the pain is going to develop into an FMLA-qualifying serious health condition. The employee's medical insurance is canceled by the employer, the employee waits months before she is approved for Medicaid, and the employee only then has the necessary surgery. This was Melanie Satterfield's nightmare, and it will be a nightmare facing thousands of other workers unless this Court intervenes.

II.

THE COURT OF APPEALS DECIDED A FEDERAL QUESTION IN A WAY THAT CONFLICTS WITH AN APPLICABLE DECISION OF THIS COURT.

Although the Court of Appeals quoted 29 C.F.R. §825.303 in its opinion, it declined to follow the content of notice provision contained in subsection (b) of this regulation.

In lieu of following 29 C.F.R. §825.303(b), the Court of Appeals formulated and applied its own content of notice rule that requires an employee seeking unforeseeable leave to

give the employer notice that is "sufficient to reasonably apprise [the employer] of the employee's request to take time off for a serious health condition." To the extent this rule follows any FMLA regulations, it follows 29 C.F.R. §825.302(c) governing notice of the need to take foreseeable leave.

Additionally, the Court of Appeals completely reversed the burden of production provision of 29 C.F.R. §825.303(b). Rather than requiring Wal-Mart "to obtain any additional required information through informal means" after Satterfield notified Wal-Mart of her need to take unforeseeable leave as required by §825.303(b), the Court of Appeals required Satterfield to obtain and provide such additional information.

29 C.F.R. §825.220(c) prohibits employers from using "the taking of FMLA leave as a negative factor in employment actions, such as hiring, promotions or disciplinary actions."

In the words of the Court of Appeals, store manager Mark Neighbors

> testified further that, because Satterfield's 16 June absence was her fourth failure to report for work in three weeks, he decided to discharge her, in accordance with Wal-Mart's policy, which allows termination for excessive absences. He testified that, in making that decision, he took into account the unexcused absences on 28 and 29 May and 3 June; and that he would not have terminated Satterfield only for missing work on 16 June.

The Court of Appeals approved and endorsed Neighbors' stated reason for firing Satterfield notwithstanding that such reason constituted a clear violation of 29 C.F.R. §825.220(c).

29 C.F.R. §825.220 and 825.303, like other FMLA regulations, were promulgated by the Secretary of Labor pursuant to statutory authority. In *Chevron U.S.A. v. National Res. Def. Counsel,* 467 U.S. 837, 844 (1984), this Court held that regulations such as this are entitled to "controlling weight unless they are arbitrary, capricious, or manifestly contrary to the statute."

Having failed to find that either 29 C.F.R. §825.220(c) or §825.303(b) were arbitrary, capricious, or manifestly contrary to the FMLA, the Court of Appeals should have given these regulations controlling weight and followed same. The decision of the Court of Appeals to decline to follow these regulations is in conflict with the decision of this Court in *Chevron.*

III.

THE COURT OF APPEALS IN THE SUBJECT CASE HAS RENDERED A DECISION ON AN IMPORTANT MATTER IN CONFLICT WITH THE DECISION OF ANOTHER COURT OF APPEALS ON THE SAME MATTER.

In *Price v. City of Fort Wayne,* 117 F.3d 1022 (7th Cir. 1997), an FMLA case, the Seventh Circuit states as follows regarding notice of the need to take unforeseeable leave under the FMLA:

> The City contends that by asking for paid leave only, and not also for unpaid leave, Price foreclosed the inference that she might be interested in FMLA leave. But the Department of Labor regulations repeatedly emphasize that it is the employer's responsibility to determine the applicability of the FMLA and to consider requested leave as FMLA leave. For example, '[t]he employee need not expressly assert rights under the FMLA or even mention the FMLA, but may only state that leave is needed. The employer will be expected to obtain any additional required information through informal means.' 29 C.F.R. §825.303(b). (emphasis supplied) 117 F.3d at p. 1026

The Court of Appeals' decision in the subject case is in conflict with the Seventh Circuit's decision in *Price* in the following particulars:

(1) The Court of Appeals in the subject case holds that an employee seeking unforeseeable leave under the FMLA must provide her employer with additional information beyond simply that leave is needed. The employee must provide her employer with notice that is "sufficient to reasonably apprise [the employer] of the employee's request to take off for a serious health condition." The notice requirement of the Court of Appeals in the subject case is far more demanding than the notice requirement of the Seventh Circuit in *Price* and is quite close to, if not the same as, the notice requirement for FMLA foreseeable leave.

(2) The Court of Appeals in the subject case holds that when the employee notifies the employer only that leave is needed, the employee, not the employer, has the burden of obtaining and providing "any additional required information." Consistent with the provisions of 29 C.F.R. §825.303(b), the Seventh Circuit in *Price* puts this burden of production on the employer.

These conflicts are important matters under the FMLA and should be conclusively resolved by this Court.

CONCLUSION

For the foregoing reasons, the petition for a writ of certiorari to the United States Court of Appeals for the Fifth Circuit should be granted.

Respectfully submitted

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APPENDIX A

[Filed March 17, 1998]

UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

NO. 97-40135

Melanie Satterfield,
Plaintiff-Appellee

versus

Wal-Mart Stores, Inc.
Defendant-Appellant

Appeal from the United States District Court
for the Eastern District of Texas

Before POLITZ, Chief Judge, GARWOOD, and BARKSDALE, and Circuit Judges.

RHESA HAWKINS BARKSDALE, Circuit Judge:

This appeal turns on whether, under the Family and Medical Leave Act of 1993 (FMLA), 29 U.S.C. § 2601, *et seq.*, Melanie Satterfield, an "at-will" employee of Wal-Mart Stores, Inc., gave adequate notice of her need for leave, because of an

unforeseeable medical problem/condition (pain in side). Wal-Mart appeals a judgment in favor of Satterfield. We REVERSE and RENDER.

I.

Satterfield was employed by Wal-Mart from late 1992 until mid-1995, when Wal-Mart discharged her for excessive unexcused absences. That October, she filed this action, claiming that Wal-Mart violated the FMLA.

A jury agreed with Satterfield. It awarded her $5,000 in actual damages, but refused to assess liquidated damages.

Post-trial, the district court denied Wal-Mart's motion for judgment as a matter of law (Wal-Mart had also so moved at the close of both Satterfield's case-in-chief and all the evidence) but granted it for Satterfield, increasing the actual damages to approximately $10,000 and awarding liquidated damages of approximately $11,000. It also awarded attorney's fees and costs of approximately $29,000, and ordered Wal-Mart to reinstate Satterfield.

II.

Wal-Mart maintains that it should have been granted judgment as a matter of law on three independent bases, claiming that Satterfield failed to prove: adequate notice for leave under the Act; the requisite "serious health condition", as defined by the

Act; and discrimination, because her excessive unexcused absences are a legitimate, non-discriminatory reason for her discharge. Alternatively, it challenges the sufficiency of the evidence of damages, the constitutionality of the increase in the actual damages award, the award of liquidated damages, the reinstatement order, and the attorney's fee award.

Because we conclude that, as a matter of law, Satterfield's notice of the need for FMLA leave was inadequate, we do not address the other issues.

A.

The Family and Medical Leave Act of 1993 was enacted because Congress found, *inter alia*, "inadequate job security for employees who have serious health conditions that prevent them from working for temporary periods". 29 U.S.C. § 2601(a)(4). The purposes of the Act include "balanc[ing] the demands of the workplace with the needs of families" and "entitl[ing] employees to take reasonable leave for medical reasons". 29 U.S.C. § 2601(b)(1) & (2). However, the FMLA seeks to accomplish these purposes "in a manner that accommodates the legitimate interests of employers". 29 U.S.C. § 2601(b)(3); *see also* 29 C.F.R. § 825.101(b) ("The enactment of the FMLA was predicated on two fundamental concerns -- the needs of the American workforce, and

the development of high-performance organizations.").

The Act applies to private-sector employers of 50 or more employees. 29 U.S.C. § 2611(4). And, an employee is "eligible" for FMLA leave if she has worked for a covered employer for at least 1,250 hours during the preceding 12 months. 29 U.S.C. § 2611(2). It is undisputed that Wal-Mart is a covered employer and Satterfield, an eligible employee.

An eligible employee is entitled to 12 work-weeks of leave in a 12-month period because of, *inter alia*, a "serious health condition" that results in the employee's inability to perform her job requirements. 29 U.S.C. § 2612(a). At the conclusion of a qualified leave period, the employee is entitled to reinstatement to her former position, or to an equivalent one, with the same terms and benefits. 29 U.S.C. § 2614(a). The FMLA makes it "unlawful for any employer to interfere with, restrain, or deny the exercise of or the attempt to exercise, any right provided under" the Act. 29 U.S.C. § 2615(a).

In determining whether an employee's leave request qualifies for FMLA protection, the employer must assess whether the request is based on a "serious health condition", and, for that purpose, may request supporting medical documentation. 29 U.S.C. § 2613; 29 C.F.R. § 825.302(c). The act defines a "serious

health condition" as "an illness, injury, impairment, or physical or mental condition that involves [:] (A) inpatient care in a hospital, hospice, or residential medical care facility; or (B) continuing treatment by a health care provider." 29 U.S.C. § 2611(11).

One of the regulations promulgated by the Secretary of Labor (approximately two months before Satterfield's discharge) defines a "serious health condition" as

> an illness, injury, impairment, or physical or mental condition that involves:
>
> (1) *Inpatient care (i.e.,* an overnight stay) in a hospital, hospice, or residential medical care facility, including any period of incapacity (for purposes of this section, defined to mean inability to work, attend school or perform other regular daily activities due to the serious health condition, treatment therefor, or recovery therefrom), or any subsequent treatment in connection with such inpatient care; or
>
> (2) *Continuing treatment* by a health care provider . . .

29 C.F.R. § 825.114 (a) (emphasis in original).

The regulation goes on to state that "continuing treatment by a health care provider" includes, in pertinent part:

(i) A period of *incapacity (i.e.,* inability to work, attend school or perform other regular daily activities due to the serious health condition, treatment therefor, or recovery therefrom) of more than three consecutive calendar days, and any subsequent treatment or period of incapacity relating to the same condition, that also involves:

(A) Treatment two or more times by a health care provider, by a nurse or physician's assistant under direct supervision of a health care provider, or by a provider of health care services (*e.g.,* physical therapist) under orders of, or on referral by, a health care provider; or

(B) Treatment by a health care provider on at least one occasion which results in a regimen of continuing treatment under the supervision of the health care provider.

29 C.F.R. § 825.114(a)(2)(i) (emphasis in original).

When the need for FMLA leave is *foreseeable,* an employee must provide her employer with no less than 30 days *advance* notice. (The type notice considered "advance" notice is a subissue here, as discussed in Part II. C.) If, however, leave is for the birth of a child or the placement of a child with the employee for adoption or foster care and must begin in less than 30 days, "the employee shall provide such

notice as is practicable." 29 U.S.C. § 2612(e)(1) & (2)(B); *see also* 29 C.F.R. § 825.302.

On the other hand, the Act is silent as to notice requirements when, as in this case, the need for leave is *unforeseeable.* But, the regulations address this question:

> (a) When the approximate timing of the need for leave is *not foreseeable,* an employee should give notice to the employer of the need for FMLA leave *as soon as practicable under the facts and circumstances of the particular case. It is expected that an employee will give notice to the employer within no more than one or two working days of learning of the need for leave, except in extraordinary circumstances where such notice is not feasible.* In the case of a medical emergency requiring leave because of an employee's own serious health condition or to care for a family member with a serious health condition, written advance notice pursuant to an employer's internal rules and procedures may not be required when FMLA leave is involved.
>
> (b) The employee should provide notice to the employer either in person or by telephone, telegraph, facsimile ("fax") machine or other electronic means. Notice may be given by the

> employee's spokesperson (*e.g.*, spouse, adult family member or other responsible party) if the employee is unable to do so personally. *The employee need not expressly assert rights under the FMLA or even mention the FMLA, but may only state that leave is needed. The employer will be expected to obtain any additional required information through informal means. The employee or spokesperson will be expected to provide more information when it can readily be accomplished as a practical matter, taking into consideration the exigencies of the situation.*

29 C.F.R. § 825.303 (emphasis added).

Our court has considered notice requirements for *unforeseeable leave* only once, in *Manuel v. Westlake Polymers Corp.*, 66 F.3d 758 (5th Cir. 1995). In that case, pursuant to the employer's "no fault" attendance policy, the employee was warned in February, July, and September 1992 that her absenteeism could result in severe disciplinary action, including termination. *Id.* at 760. At the end of December 1992, the employee had missed 14 days of work in the preceding three months, and was warned again that continued absenteeism could result in suspension or termination. *Id.*

In October 1993, the employee received permission from her supervisor to miss work on a Friday for removal of an ingrown toenail; her doctor had advised her that she could return to work the following Monday. *Id.* Complications developed after the procedure, and the employee contacted her supervisor on the following Monday and told him that she could not return to work because of her toe. *Id.* Keeping in constant contact with her employer, she missed work for more than a month. *Id.* After the employee returned to work, she was suspended for four days and issued a final warning for unsatisfactory attendance, which stated that her employment would be terminated unless she reported to work as scheduled. *Id.* Less than two months later, the employee went home from work after becoming ill. She returned three days later, but was fired because of her persistent absenteeism, including due to the toenail removal. *Id.*

At the time of discharge, unlike in Satterfield's case, the final regulations had not been adopted. The district court granted summary judgment for the employer, holding that the employee's notice of her extended absence due to the toenail was insufficient to trigger protection under the FMLA because the employee did not expressly refer to the Act when requesting leave. *Id.* at 761. But, our court held that

the district court erred by so interpreting the FMLA, and remanded for consideration of whether the employee gave sufficient notice to her employer *of the need* for FMLA leave. In regard to that issue, our court "decline[d] to announce any categorical rules for the content of the notice by an employee", *id.* at 764, but stated, consistent with the final regulations, quoted *supra*, which had been adopted after the employee's discharge:

> What is practicable, both in terms of the timing of the notice and its content, will depend upon the facts and circumstances of each individual case. *The critical question is whether the information imparted to the employer is sufficient to reasonably apprise it of the employee's request to take time off for a serious health condition.*

Id. (emphasis added).

In *Hopson v. Quitman County Hosp. & Nursing Home, Inc.*, 126 F.3d 635 (5th Cir. 1997), our court, addressing the notice requirements for *foreseeable -- not unforeseeable* -- leave, including whether a "change in circumstances" must be medically-related, stated that, "in a case where the court is asked to apply the standards of a relatively recent statute to *undisputed facts*, it is our opinion that the adequacy

of Hopson's notice is a *fact issue."* *Id.* at 640 (emphasis added) (citing *Manuel).*

> What constitutes a "change in circumstances," whether a plaintiff's notice is given "as soon as practicable", and whether the employee has *made a reasonable effort to schedule her treatment so as not to disrupt unduly the operations of the employer* requires an inquiry into the particular facts and circumstances of each case. Such determinations are questions of fact and are better left to the jury with its traditional function of assessing human behavior and expectations.

Id. (emphasis added).

Concerning the adequacy of notice of a need for *foreseeable* FMLA leave, this passage could be read to foreclosure judgment as a matter of law (or summary judgment, for which the standard is, of course, the same, *see* Fed. R. Civ. P. 50, advisory committee note, 1991 amendment, and 56), and, instead, always require a jury determination. But, needless to say, for *unforeseeable* leave, as in the case at hand, the questions are not totally the same (and arguably less complex and less subjective). In any event, we do not read the passage so broadly.

Obviously, the court meant that, even based on the undisputed evidence in *that case,* rational triers of

fact could nevertheless differ on whether the advance notice was adequate. *Cf. Little v. Liquid Air Corp.*, 37 F.3d 1069, 1075-76 n. 14 (5th Cir. 1994) (en banc) (noting that dicta that summary judgment is generally not appropriate in certain types of cases "is essentially empty chatter . . . inasmuch as we have never reversed a district court's entry of summary judgment solely because it involved a particular class of allegations", and reject "any suggestion that the appropriateness of summary judgment can be determined by such case classification"). In this regard, and as discussed *infra*, other circuits have granted summary judgment for the employer on the question of adequacy of notice for *unforeseeable* FMLA leave. Moreover, although it apparently was not an issue in *Manuel*, which also involved an appeal from a summary judgment, we note, nevertheless, that our court gave no indication that summary judgment was not an available means for resolving FMLA-notice questions.

Accordingly, to determine whether the district court erred by denying judgment as a matter of law on the notice-adequacy, we must view the evidence and inferences in the light most favorable to Satterfield and determine whether a rational juror could conclude, pursuant to the test established by *Manuel*, 66 F.3d at 764, that the information

Satterfield gave Wal-Mart was "sufficient to reasonably apprise it of [Satterfield's] request to take time off for a serious health condition." *See* Fed. R. Civ. P. 50; *Boeing Co. v. Shipman*, 411 F.2d 365, 374-75 (5th Cir. 1969) (en banc), *overruled on other grounds, Gautreaux v. Scurlock Marine, Inc.*, 107 F.3d 331 (5th Cir. 1997) (en banc); *see also Bellows v. Amoco Oil Co.*, 118 F.3d 268, 273 (5th Cir. 1997), *cert. denied*, ___ U.S. ___, 118 S. Ct. 739 (1998).

B.

It goes without saying that the FMLA makes incredible inroads on an at-will employment relationship, such as Satterfield's with Wal-Mart. for example, as stated in the earlier-quoted pertinent regulation, "[i]n a case of a medical emergency requiring leave because of an employee's own serious health condition . . . written advance notice *pursuant to an employer's internal rules and procedures* may not be required when FMLA leave is involved." 29 C.F.R. § 825.303(a) (emphasis added). This notwithstanding, Satterfield's employment history and her knowledge, as well as utilization, of Wal-Mart's rules and procedures concerning leave and absenteeism provide a backdrop for determining whether she gave sufficient FMLA-notice.

At the commencement of her employment with Wal-Mart in December 1992, Satterfield received an

Associate's Handbook and Associate's Benefit Book. She also signed an acknowledgment, stating that she had received a copy of Wal-Mart's policies and procedures and understood that her employment was "on an 'at-will' basis" and that Wal-Mart had the right to "terminate the employment relationship with or without good cause and without prior notice".

The Benefit Book explains how employees can maintain insurance benefits following termination. It also describes the procedures applicable to the different types of leaves of absence available, including medical leave. It states that, if an employee has advance notice that leave will be required, she should submit a Request for Leave at least 30 days prior to the day leave is to begin "or as soon as practical after the associate learns of the need for leave"; and that, for unexpected leave, employees "are required to notify their supervisor as soon as practical but not later than three days after the commencement of the leave".

Even though these procedures pre-dated the FMLA, they are, most interestingly, quite similar to the FMLA and implementing regulations. In fact, it may well be that Wal-Mart was trying to tract the FMLA, then in the works, but not signed into law until early 1993. A version of the FMLA was passed

in 1990, H.R. 770, 101st Cong., 1st Sess. (1989), but was vetoed by President Bush on 29 June 1990. S. Rep. No. 68, 102d Cong., 1st Sess. 67-68 (1991). The House of Representatives failed to override the veto on 25 July 1990. H.R. Rep. No. 135, 102d Con., 1st Sess., pt. 1, at 18 (1991). Another version was passed in 1992, S. 5, 102d Cong., 1st Sess. (1991); H.R. 2, 102d Cong., 1st Sess. (1991). It was also vetoed by President Bush. A&P S. Doc. 102-26 (22 Sept. 1992). The Senate overrode the veto, 138 Cong. Rec. S14841-03 (24 Sept. 1992), but the House did not, 138 Cong. Rec. H9930-03 (30 Sept. 1992). In short, the FMLA did not become law until approximately three months after Satterfield began working for Wal-Mart.

Satterfield's personnel file confirms that she was quite familiar with Wal-Mart's policies for leaves of absence In February 1993, pursuant to Wal-Mart's leave request policy, she requested, and received, medical leave when she had her gallbladder removed; and, in August 1994, she requested, and received, a leave of absence from 22 August through 5 September, in order to locate a new babysitter for her son.

Satterfield's attendance record, included in her personnel file, contains the notation "NS" ("no show") for 28 and 29 May and 3 June, 1995. It is

undisputed that these absences were unrelated to the alleged "serious health condition" at issue.

On Friday, 16 June, Satterfield did not report for scheduled work. She testified that, when she awoke that morning, she was having a lot of pain in her right side, which worsened after she remained standing for a long time; that she did not know the cause or probable duration of the pain; and that, because her job as a cashier required her to stand, she did not think she was going to be able to work that day. Lacking a telephone, she asked her mother to deliver a note to Wal-Mart management. According to Satterfield, the note stated that she "was having a lot of pain and . . . wouldn't make it in to work that day, and could [she] make up that day on one of [her] days off". (On cross-examination, Satterfield testified that the note also specified that the pain was in her "side".) In addition, the note stated that her mother could pick up Satterfield's paycheck.

Satterfield's mother, Jean Grimes, who read the note, testified that it stated "that [Satterfield] was sick and that could I please pick up her check and that could she make up her hours whenever -- on her scheduled off days". Grimes also testified that she told the store manager, Mark Neighbors, on 16 June that Satterfield was sick, but that she did not know "what was wrong with that girl" because, "[i]f

somebody is having pain in that particular area of the body, if it's not appendicitis, then I have no idea what it is"; however, she could not recall whether Neighbors said anything to her during that conversation that indicated he thought Satterfield was sick that day.

Satterfield testified further that, later that day (16 June), she was still having "some pain" and thought she needed to see a doctor; and that, later than afternoon, just before her doctor's office closed, she drove to a convenience store a few blocks from her home and telephoned for an appointment, but the doctor was unable to see her until the following Tuesday, 20 June.

On direct examination, Satterfield testified that she did not recall whether she was scheduled to work on 17-19 June, but that she was not able to work on any of those days because she was "having a lot of pain". On cross-examination, upon being shown the 17-20 June work schedule, Satterfield acknowledged that she was scheduled to work each of those days. She also admitted that, by the afternoon of 16 June, when she scheduled her doctor's appointment, she recognized the possibility that she was not going to be able to work 17-20 June.

Nevertheless, Satterfield testified that, after scheduling that appointment, she did not telephone

Wal-Mart from the convenience store on 16 June to notify her supervisor of the status of her condition, or the scheduled appointment, or that she might be out for another four days; *in fact, she did not contact Wal-Mart until 28 June.* But, she testified that her mother informed Wal-Mart every day that she would miss work. At odds with this mother-advised-every-day testimony is the mother's (Grimes') testimony that Neighbors informed her *on 16 June* that he had decided to fire Satterfield, but that she did *not* so advise Satterfield.

Satterfield saw her physician on 20 June; he prescribed antibiotics and pain pills. According to Satterfield, her physician also then gave her a written medical excuse, and her mother took it to Wal-Mart; her mother also testified that she delivered a medical excuse to Wal-Mart for Satterfield on 20 June. However, Satterfield's personnel file does not contain a medical excuse dated 20 June. And, on cross-examination, Satterfield admitted that, after seeing her doctor, she once again did not contact Wal-Mart.

Satterfield next saw her doctor at the emergency room late on 27 June; she testified that, at that time, he told her that she would need surgery. However, neither the doctor's, nor emergency room's, records contain any notations on that date about surgery.

Satterfield testified that the doctor gave her a medical excuse, which her mother took to Wal-Mart. The doctor's excuse, which was introduced into evidence, is dated 28 June, 1995, and states that Satterfield has been under the doctor's care "from 6-20-95 [four days after Wal-Mart's decision to discharge her] to date", and "is able to return to work on: indefinite".

Following the 27 June emergency room treatment, Satterfield testified that, on 28 June, she went to the hospital for surgery, but was then informed that her health insurance had been canceled. Because she could not pay for the surgery, it was not then performed. That same day, after becoming aware of the insurance cancellation, Satterfield contacted Wal-Mart's store manager, Neighbors, about her condition and the status of her insurance, and learned that she had been fired.

Several weeks later, in August 1995, Satterfield wrote a letter to Wal-Mart's district manager, Terry Farr, stating that she had spoken with an attorney, who said she should have been covered by the FMLA, and that she was fired for being sick. Satterfield testified that she did not receive a response from Wal-Mart.

Satterfield was treated at the emergency room again on 4 and 10 July and 16 September 1995, and 18

February 1996. But, she did not revisit her doctor in his office until 1 April 1996. On 3 April, after qualifying for Medicaid, she had surgery. She testified that the pain did not bother her after the surgery. (Satterfield's physician did not testify at trial.) In May 1996, she began working part-time for Dairy Queen.

Neighbors, the Wal-Mart store manager, testified that, on 16 June (Friday), Satterfield's mother, who was employed at the same Wal-Mart store, delivered a note to him from Satterfield, which only stated: "Please allow my mother to pick up my check". He testified that, upon receive of the note, he asked Grimes, "Where is Melanie?" Why isn't she coming to work?"; and that Grimes responded, "I don't know what's wrong with that girl". Neighbors, however, did not keep the note.

Neighbors testified further that, because Satterfield's 16 June absence was her fourth failure to report for work in three weeks, he decided to discharge her, in accordance with Wal-Mart's policy, which allows termination for excessive absences. He testified that, in making that decision, he took into account the unexcused absences on 28 and 29 May and 3 June; and that he would not have terminated Satterfield only for missing work on 16 June.

Wal-Mart's records reflect that Satterfield's employment was officially terminated on Monday, 19

June. Satterfield's exit interview form, signed by Neighbors, states in the "Explanation of Termination" section: "Unreported Absence - didn't call in or show 5/28/95, 5/29/95, 6/3/95, 6/16/95".

In addition, Neighbors testified that he told Satterfield's mother on 19 June (as stated, Grimes testified that this conversation occurred instead on 16 June) that he had decided to discharge Satterfield because of her excessive unexcused absences; according to Neighbors, Grimes did *not* tell him that Satterfield's absence was the result of illness.

Resolving the factual variances in favor of Satterfield, as we must, the evidence establishes that the *only* information Satterfield imparted to Wal-Mart *prior* to its discharge decision was a note delivered to Wal-Mart by her mother on 16 June, advising that she was "was having a lot of pain in her side", and would not be able to work that day, but would like to make it up on one of her days off; and her mother's statement to Neighbors that Satterfield was "sick". As hereinafter discussed, we conclude that, pursuant to the *Manuel* test, 66 F. 3d at 764, no rational trier of fact could conclude that this was "sufficient to reasonably apprise [Wal-Mart] of [Satterfield's] request to take time off for a serious health condition" within the meaning of the FMLA.

"While an employer's duty to inquire may be predicated on statements made by the employee, the employer is not required to be clairvoyant." *Johnson v. Primerica*, 1996 WL 34148, at *5 (S.D.N.Y. 1996). Although Satterfield was able to telephone her doctor's office on the afternoon of 16 June and schedule an appointment, she made no attempt to then contact Wal-Mart to advise of both the status of her condition and that appointment for the following Tuesday, 20 June. *Indeed, she did not contact Wal-Mart until 28 June.*

The 28 June doctor's excuse Satterfield provided Wal-Mart stated that she had been under the doctor's care since 20 June, *after* Wal-Mart had discharged her, and that it was indefinite as to when she could return to work; but, it did *not* state that the condition for which she was being treated necessitated her absence from work on 16 June. As explained, Satterfield and her mother testified that they also provided Wal-Mart an excuse dated 20 June. But, there is no evidence regarding its contents.

Obviously, "[w]hat is practicable, both in terms of the *timing* of the notice and its *content*, will depend upon the facts and circumstances of each individual case." *Manuel*, 66 F.3d at 764 (emphasis added); *see* 29 C.F.R. §825.303. Other very relevant facts and circumstances at hand include: (1) Satterfield knew

how to obtain similar leave from Wal-Mart, because she had requested, and received, leave pursuant to its policies in 1993 and 1994; and (2) in the three weeks preceding 16 June 1995, she had three unexcused absences.

Considering all of these facts and circumstances, no rational trier of fact could conclude that the meager information Satterfield imparted to Wal-Mart on 16 June was sufficient to require Wal-Mart to seek additional information about her condition, and whether it qualified for FMLA protection. *See Cehrs v. Northeast Ohio Alzheimer Research Center*, 959 F. Supp. 441, 449 n. 9 (N.D. Ohio 1997) ("While notice to the employer may be informal and need not invoke the FMLA by name, the employer, at a minimum, must receive information sufficient to make it evident that the leave requested is qualifying leave under the FMLA."); *Reich v. Midwest Plastic Engineering, Inc.*, 1995 WL 514851, at *3 (W.D. Mich. 1995) ("at a minimum, an employee must inform her employer of her condition with sufficient detail to make it evident that the requested leave is protected as FMLA-qualifying leave").

It is well to remember that the FMLA is designed only to protect employees when there is a "serious health condition", and only in a manner that "accommodates the legitimate interests of

employers". 29 U.S.C. § 2601(a)(4), (B)(3). Requiring an employer to undertake to investigate whether FMLA-leave is appropriate each time an employee, who has been absent without excuse three times in the preceding three weeks, informs the employer that she will not be at work "that day" because she is "having a lot of pain in her side" or is "sick", is quite inconsistent with the purposes of the FMLA, because it is not necessary for the protection of employees who suffer from "serious health conditions", and would be unduly burdensome for employers, to say the least. See *Price v. City of Fort Wayne*, 117 F.3d 1022, 1023 (7th Cir. 1997) ("The goal [of the FMLA] was not to supplant employer-established sick leave and personal leave policies, but to provide leave for more uncommon and, presumably, time-consuming events such as having or adopting a child or suffering from what is termed a 'serious health condition'.").

The same is true of the information provided after 16 June. It was either too little, or too late, or both. No rational trier of fact could conclude otherwise.

Even though each case obviously turns on its own particular facts and circumstances, we find it instructive, nevertheless, to consider other decisions regarding the adequacy of notice for *unforeseeable* leave. In *Carter v. Ford Motor Co.*, 121 F.3d 1146 (8th

Cir. 1997), the court affirmed a summary judgment for the employer, Ford. (As noted *supra*, this is an example of the summary judgment procedure being appropriate, as it must be under the applicable Federal Rules of Civil Procedure, so long as those Rules are satisfied, for FMLA notice-adequacy questions.)

On 16 February 1994, the plaintiff's wife, who was also a Ford employee, telephoned the labor relations office at the plant and stated that she was sick and that she and her husband "were going to be 'out' because of family problems". *Id.* at 1147. Two days later, the plaintiff (husband) was diagnosed as suffering from anxiety and depression, and his doctor concluded that he was totally disabled. *Id.* On 21 February, the plaintiff called the labor relations office and stated that he would be "out sick". *Id.* In response to inquiries, the plaintiff stated that the problem "was personal" and that "he did not know" when he would return to work. *Id.* On 25 February, the plaintiff called the labor relations office again and stated that he was still sick, but he did not request medical leave at that time. *Id.* That same day, the plaintiff received a letter "instructing him to report for work or provide a reason justifying his continued absence within five days"; the letter also warned that failure to comply would result in termination. *Id.*

On 28 February, the plaintiff went to the Ford plant and requested sick leave; he was given a form for his attending physician to complete as soon as possible to explain the need for such leave. *Id.* Although his physician completed the form on 2 March, the plaintiff did not then return it, allegedly based on the labor relations representative's assurance that there was no hurry. *Id.* The plaintiff also claimed that his wife telephoned the labor relations office on 2 March to advise that she would soon deliver the document completed by her husband's physician, but that she did not do so because the representative allegedly told her that her husband had already been fired. *Id.* Ford discharged the plaintiff on 3 March, for failure to provide medical documentation of the need for leave. *Id.* at 1148.

As stated, the Eighth Circuit affirmed the summary judgment for the employer, stating that, evēn assuming the employee had a "serious health condition" within the meaning of the FMLA (which the court considered "doubtful"), the employee did not give Ford adequate or timely notice of his need to take leave because of such condition. *Id.* at 1148-49. The notice given to Wal-Mart by Satterfield, that she was "having a lot of pain in her side" and would not be at work on 16 June, is even less informative than

Carter's statements to Ford that he was "sick" and did not know when he would be able to return to work. Moreover, Satterfield had a history of unexcused absences -- three in the three weeks preceding 16 June. And, again, subsequent notice was either too little, or too late, or both.

Again, consistent with granting summary judgment for notice-adequacy questions, such judgment for the employer was affirmed by the Eleventh Circuit in *Gay v. Gilman Paper Co.*, 125 F.3d 1432 (11th Cir. 1997). Gay had been warned on five occasions because of tardiness or absenteeism. *Id.* at 1433. She worked on 18 June 1994, and was scheduled to return four days later, on 22 June. *Id.* However, on 20 June, she was admitted to a psychiatric hospital for treatment for a nervous breakdown. *Id.* On 22 June, her husband informed her supervisor by telephone that she was in the hospital "having some tests run". *Id.* In his deposition, Gay's husband admitted that he had lied to Gay's supervisor about here whereabouts and condition, and had instructed his sons not to give the employer any information about her condition or location. *Id.* The plaintiff did not contact her employer regarding her condition or her absence from work during the following week. *Id.* at 1433-34. On 28 June, she was fired for "extended failure to report off, or explain absences". *Id.* at 1434.

The Eleventh Circuit rejected Gay's contentions that her husband's assertion that she was in the hospital for tests was sufficient to put her employer on notice that her condition was potentially FMLA-qualifying and was, therefore, sufficient to shift the burden to the employer to make further inquiry as to whether Gay's absence qualified for FMLA protection. *Id.* at 1434-35.

> [N]ot only was there a dearth of information provided, but the information that was provided was false. Gay's husband informed her supervisor that Gay was having some tests run on the first day of her absence from work. When questioned by Gay's supervisor about his wife's condition, Gay's husband deliberately withheld information concerning the true nature of her condition and instructed his sons to do the same. Under these circumstances, the burden to request further information never shifted to [the employer] because [the employer] could not reasonably be expected to conclude that Gay's absence might have qualified for treatment under the FMLA.

125 F.3d at 1436.

Although Satterfield did not give Wal-Mart false information about her condition, she withheld: (1)

the status of her condition on the afternoon of 16 June; (2) the fact that she had scheduled a doctor's appointment for 20 June; and (3) her expectation that her condition would not improve prior to that appointment. In the light of her previous use of Wal-Mart's leave policy, and her three unexcused absences during the preceding three weeks, Wal-Mart could not reasonably be expected to conclude that Satterfield's absence on 16 June might have qualified for FMLA protection.

The inadequacy of Satterfield's notice to Wal-Mart is even more apparent when compared to that provided by the employee in *Brannon v. OshKosh B'Gosh, Inc.*, 897 F. Supp. 1028 (M.D. Tenn. 1995). There, the employee informed her employer in advance that her three-year-old daughter was ill and that she might have to miss work if her daughter's condition did not improve; notified her supervisor by telephone that her daughter was too sick for her to come to work each workday that she was at home caring for her daughter; and submitted a medical note to her employer requesting that her absences from work be excused on the basis of her daughter's illness. 897 F. Supp. at 1032-33. The court concluded that the employer was sufficiently aware that the plaintiff's absence may have qualified under the FMLA and thus was obligated to inquire as to whether her

absences were excusable. *Id.* at 1039. Obviously, Brannon's advance notice and continuous contact with her supervisor were far more detailed than the vague information Satterfield imparted to Wal-Mart. Moreover, unlike Satterfield, Brannon did not have a history of failing to report for work without contacting her employer. *See also Price v. City of Fort Wayne,* 117 F.3d at 1025 (employee who filled out employer-provided leave request form, indicated that cause was medical need, and attached doctor's note requiring her to take the time off provided sufficient information to put employer on notice of possible FMLA leave situation).

C.

The FMLA regulations require covered employers to post on their premises, in conspicuous places, a notice explaining the provisions of the Act and the procedures for filing complaints of violations. 29 C.F.R. §825.300(a). Along that line,

> [a]n employer that willfully violates the posting requirement may be assessed a civil money penalty by the Wage and Hour Division not to exceed $100 for each separate offense. Furthermore, *an employer that fails to post the required notice cannot take any adverse action against an employee, including denying FMLA*

leave, for failing to furnish the employer with advance notice of a need to take FMLA leave.

29 C.F.R. § 825.300(b) (emphasis added).

As she did in response to Wal-Mart's motion for judgment as a mater of law at the close of all the evidence, Satterfield contends that, because Wal-Mart did not present evidence that it posted the required notice, it was prohibited from firing her, even if she failed to give notice of her need for FMLA leave. We disagree.

In the first place, nothing in the regulations places the burden of proving compliance with § 825.300(a) on the employer. In any event, § 825.300(b) by its own terms, applies only in situations where the employee is required to provide *"advance"* notice of a need for FMLA leave. As discussed *supra*, such *advance* notice is required only when the need for FMLA leave is *foreseeable;* it is not required when, as in this case, the need is *unforeseeable.*

On the other hand, as also discussed *supra*, when the need for leave is *unforeseeable*, an employee is not required to give advance notice. Indeed, on occasion, the employee would *not* be able to give notice in advance. The employee can, instead, give notice after absence from work, provided it is given "as soon as practicable under the facts and

circumstances of the particular case". 29 C.F.R. § 825.303(a) ("It is expected that an employee will give notice to the employer within no more than one or two working days of learning of the need for leave, except in extraordinary circumstances where such notice is not feasible."). Again, case law supports our conclusion. *See Gay v. Gilman Paper Co.*, 125 F.3d at 1436 n.6 (emphasis added) (rejecting employee's contention that, even if notice provided was insufficient, employer should be estopped from challenging sufficiency of her notice because it failed to comply with posting requirements, because those requirements "do *not* address the notice required in the case of an employee's *unforeseeable need* for FMLA leave"); *see also Reich v. Midwest Plastic Engineering, Inc.*, 66 Empl. Prac. Dec. ¶ 43,701, 1995 WL 478884, at *7 (W.D. Mich. 1995) (employer's alleged failure to post notices "would have been relevant only if [employee] had been required to provide advance notice of her intent to take leave").

III.

For the foregoing reasons, the judgment is REVERSED, and judgment is RENDERED in favor of Wal-Mart.

REVERSED and RENDERED

Supreme Court, U.S.
FILED
JUL 21 1998
CLERK

No. 97-2056

IN THE
Supreme Court of the United States
OCTOBER TERM, 1997

MELANIE SATTERFIELD,
Petitioner,

v.

WAL-MART STORES, INC.
Respondent,

Petition For Writ of Certiorari
To The United States Court of Appeals
For The Fifth Circuit

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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QUESTION PRESENTED

Whether Petitioner, Melanie Satterfield, gave her former employer, Wal-Mart, adequate notice of her need for FMLA leave due to an unforeseeable medical problem?

LIST OF ALL PARTIES TO THE PROCEEDINGS

1. Melanie Satterfield, Petitioner
2. Wal-Mart Stores, Inc., Respondent

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STATEMENT OF THE CASE

Respondent Wal-Mart directs the Court to the facts as accurately outlined in the opinion of the court of appeals, (Pet. App. 13a-23a), but Wal-Mart adds the following.

Wal-Mart hired Satterfield in December, 1992. At that time, Wal-Mart provided her with an Associate's Handbook and Associate's Benefit Book. Section M6 of the benefit book specifically describes Wal-Mart's leave of absence procedures, including those for medical leave. Notably, Wal-Mart's policy provides eligible employees leave benefits greater than those required by the FMLA. If employees have advance notice that leave will be required, they must submit a request for leave at least 30 days prior to the day the leave is to begin, "or as soon as practical after the associate learns of the need for leave." (Pl. Ex. 1, at M7). If leave is unexpected, "associates are required to notify their supervisor as soon as practical but not later than three days after the commencement of the leave." *Id.*

Upon her employment, Satterfield (a/k/a Birdsong) signed an acknowledgment stating that she had received a copy of Wal-Mart's policies and procedures, that she understood her employment was on an "at-will" basis, and that Wal-Mart had the right to "terminate the employment relationship with or without good cause and without prior notice." (Def. Ex. 2).

As observed by the Court of Appeals, Satterfield was quite familiar with Wal-Mart's leave procedures. In 1993 and 1994, Satterfield exercised her rights under that policy by requesting, and receiving, leave on several occasions. (Tr. Vol. I, p. 100-02, 121). As one example, in August 1994 she obtained a fourteen day leave due to her need to locate a new babysitter for her son. (Def. Ex. 2).

Moreover, Wal-Mart's absence policy allows for termination of an employee who incurs three unexcused absences. The absences do not have to be consecutive.

However, Satterfield missed work, without excuse and without requesting leave, on at least three occasions in the three weeks prior to her termination on June 16, 1995. (Tr. Vol. I, pp. 118-19). Satterfield's attendance record indicates she was a "no show", or "NS", on May 28, May 29, and June 3 of 1995. (Def. Ex. 2). It is undisputed that these three absences were not related to any "serious health condition."

On Friday, June 16, 1995, Satterfield did not come to work as scheduled. Because this was her fourth "no show" in three weeks, Mark Neighbors, the store manager, terminated Satterfield for excessive unexcused absences consistent with Wal-Mart's policy. (Tr. Vol. 1, pp. 155, 156-57). The written "exit interview" indicates that Satterfield never requested leave at any time prior to Neighbors' decision to terminate her employment, and Neighbors had no indication that Satterfield needed leave. (Tr. Vol. I. pp. 188, 190). Satterfield incorrectly asserts that "Neighbors fired [her] on June 16, 1995, because she failed to report to work *that day*," (Pet. for Cert. 8) (emphasis added), acknowledging, almost begrudgingly, that "Neighbors may have had in mind previous work absences." Satterfield goes on to falsely announce that "it is undisputed that he fired her because of her work absence on June 16, 1995, not because of previous work absences." (Petition, p. 8). This is *not* undisputed. In fact, Neighbors testified that he would *not* have terminated Satterfield only for missing work on June 16.

Satterfield's mother, Jean Grimes, delivered a note to Neighbors on June 16, 1995 which advised that Satterfield

was "sick" and authorized Grimes (who also worked for Wal-Mart) to pick up her pay check. Upon Neighbors' inquiry, Grimes told him that she did not know "what was wrong" with Satterfield. Satterfield further testified that the note stated that she was "having a lot of pain and that [she] wouldn't make it in to work that day, and could [she] make up that day on one of [her] day's off." (Tr. Vol. 1, p. 50). As a Wal-Mart employee, Grimes, like Satterfield, was aware of Wal-Mart's leave policies.

Later on June 16, Satterfield decided she should see a doctor. Because she did not have a telephone, she drove three blocks to a convenience store to call Dr. Gurav just before his office closed. She could not get an appointment until June 20, 1995. (Tr. Vol. 1, p. 52). At this time, Satterfield recognized the possibility that she was not going to be able to work before seeing the doctor, and she was scheduled to work from June 17-20. Yet, despite driving the three blocks to the convenience store to call her doctor, and despite the fact that she lived only five blocks from the store, she neither drove to the store to notify anyone that she had scheduled a doctor appointment nor telephoned her manager from the convenience store. Further, at no time did she request or pick up a leave form.

It is uncontroverted that Satterfield failed to appear for work on June 17-20. (Tr. Vol. I, pp. 105-06). The following Monday, June 19, 1995, Neighbors communicated his decision to discharge Satterfield to Helen Mills, the personnel manager, who performed the necessary paperwork. Satterfield's exit interview states that she was terminated for unexcused absences on 5/28/95, 5/29/95, 6/3/95, 6/16/95. (Def. Ex. 2). That same day, Neighbors informed Grimes that he had decided to terminate Satterfield because of excessive unexcused absences. (Tr. Vol. I, pp. 188-89). Grimes never indicated that Satterfield was ill or that she had

a medical condition which was preventing her from working. (Tr. Vol. I, p. 186).

On June 20, 1995, Satterfield saw Dr. Gurav, who prescribed pain pills and antibiotics. Satterfield next saw Dr. Gurav at the emergency room on the night of June 27, 1995, and was allegedly told that would need surgery. However, there are no notations in Dr. Gurav's records that surgery was necessary. (Tr. Vol. I, p. 117).

Satterfield made no effort to contact Wal-Mart until June 28, 1995, after the hospital informed her that her health insurance had been canceled. (Tr. Vol. I, p. 62). This was the first time she informed Neighbors of her condition. (Tr. Vol. I. p. 162). Dr. Gurav later provided Wal-Mart with a medical excuse dated June 28, 1995, stating that Satterfield had been under his care since June 20, 1995. However, the excuse did not say that her condition necessitated her absence from work on June 16, 1995.

SUMMARY OF ARGUMENT

Satterfield has presented no issue meriting this Court's attention. She has mischaracterized the questions presented and attempted to construct a conflict between the Court of Appeals' decision and two other cases. In reality, there is no conflict, and she makes no effort to discuss, or challenge, the true issue decided by the Court of Appeals - that her notice was inadequate as a matter of law. Her entire argument presumes that she gave Wal-Mart notice that FMLA leave was needed. She did not. The Court of Appeals' opinion creates no conflict with any decision from this Court or any other Circuit. Additionally, there exist other alternative grounds, argued below but not reached, which allow the result to stand. As no conflict exists, and no

important issue is raised, Rule 10 jurisdiction is not invoked. Therefore, this Court should deny the writ.

ARGUMENT

REASONS FOR DENYING THE WRIT

Although Petitioner cites 28 U.S.C. § 1254(1) as a jurisdictional basis for review, her challenge underscores the reasons for Supreme Court Rule 10. Rule 10 states:

> A review on writ of certiorari is not a matter of right, but of judicial discretion. A petition for writ of certiorari will be granted only for compelling reasons. The following, although neither controlling nor fully measuring the Court's discretion, indicate the character of reasons the Court considers:
>
> (a) a United States court of appeals has entered a decision in conflict with the decision of another United States court of appeals on the same important matter ..
>
> (c) ...a United States court of appeals has decided an important question of federal law that has not been, but should be, settled by this Court, or has decided an important federal question in a way that conflicts with relevant decisions of this Court.

SUP. CT. R. 10

Neither criteria is met here. In reality, this case presents nothing more than a legal determination of a fact specific inquiry. For the reasons that follow, this Court's

jurisdiction is not invoked under any prong of Rule 10. Therefore, the petition should be denied.

A. This case presents no important question of federal law to be "settled," thus Rule 10(c) jurisdiction is not invoked.

1. *Satterfield's mischaracterization of the questions presented attempts to evade the determinative inquiry.*

Initially, Satterfield's phrasing of her "questions presented" is suspect. She characterizes the first issue as "whether an employee seeking unforeseeable leave under the Family and Medical Leave Act of 1993 ("FMLA") is required as an initial matter to notify her employer of anything other than leave is needed." (Pet. for Cert. i). This question, as stated by Satterfield, would be answered in the affirmative by the Fifth Circuit's opinion here. (*See* Pet. App. 8a) (quoting 29 C.F.R. § 825.303: "[t]he employee need not expressly assert rights under the FMLA or even mention the FMLA, but may only state that leave is needed"). Satterfield implies by her first question presented that she advised Wal-Mart that "leave was needed." In fact, she did not. The crux of the case concerns whether the information Satterfield communicated to Wal-Mart was sufficient to "reasonably apprise [Wal-Mart] of [Satterfield's] request to take time off for a serious health condition." (Pet. App. 10a) (quoting *Manuel v. Westlake Polymers Corp.*, 66 F.3d 758, 764 (5th Cir. 1995)). The Fifth Circuit determined, in the context of an *unforeseeable* need for leave, that Satterfield failed as a matter of law to give adequate notice of her need for FMLA leave. This is the real issue presented by Satterfield. The Fifth Circuit correctly decided that issue against her.

Additionally, Satterfield's second question presented likewise presumes that she provided sufficient notice to Wal-Mart in order to shift the burden to Wal-Mart to obtain additional information regarding her claimed illness through informal means. She then wrongly argues that the Court of Appeals ignored the regulations by not concluding that Wal-Mart failed to "obtain additional information."

Satterfield's questions presented do not address the real issue decided by the Fifth Circuit, but rather raise tangential matters by presuming that the Fifth Circuit's conclusion that Satterfield gave inadequate notice is incorrect, but without actually arguing that point. Moreover, Satterfield's second question presented, and the argument contained in the petition relevant to that question, when viewed in light of the facts of this case, would place the entire burden on employers to investigate an employee's illness even when the only notification given is a sick call, which was the only notification given by Satterfield during the relevant time period.

Interestingly, Satterfield's second question presented also includes a statement that her illness *subsequently developed* into a serious health condition within the meaning of the FMLA. This statement tacitly acknowledges that Satterfield did not have a serious health condition on June 16, 1995, which was another argument made by Wal-Mart in the Court of Appeals, though not reached by that Court.

2. ***The Fifth Circuit correctly decided the true issue - adequacy of notice - and its opinion does not merit this Court's attention.***

Prior to *Satterfield*, the Fifth Circuit had considered notice requirements for unforeseeable leave only once, in *Manuel*, 66 F.3d at 758. *Manuel* did not establish any

categorical rules for the content of notice by an employee, but emphasized that the critical question is whether the information "imparted to the employer is sufficient to reasonably apprise it of the employee's request to take time off for a serious health condition." *Id.* at 764. Satterfield has not identified any case in conflict with this pronouncement.

The trial court is obliged to examine the legal sufficiency of the evidence upon the making of a timely Rule 50 motion. The Court of Appeals has a duty to give guidance to trial courts regarding what does or does not constitute legally sufficient evidence of notice. Satterfield's notice was so deficient that there is no legitimate, material fact question to present to a jury and no reasonable jury could conclude that she imparted enough information to "reasonably apprise" Wal-Mart of her need to take time off for a serious health condition.

Satterfield had a well documented history of missing work without excuse. When she was sick on June 16, 1995, she only advised Wal-Mart that she was "sick" and requested to make up the day at another time. Her mother could not provide Wal-Mart any details regarding Satterfield's illness. Certainly, there was no indication to Wal-Mart on June 16, 1995 that Satterfield would require more time off than one day only. Once her condition did not improve, and although she realized on June 16 the possibility that she could not return to work for some time, she still did not contact Wal-Mart herself, or through her mother, a co-employee, and missed the next four days she was scheduled to work. She could have easily contacted Wal-Mart from the same phone she used to call her doctor, or could have driven the additional five blocks to report in personally at the store. She did neither. In light of these facts, the Court of Appeals made a correct decision regarding a fact specific inquiry.

Satterfield has presented no issue which would potentially have such a broad impact upon FMLA cases generally so as to merit this Court's time. Therefore, Rule 10 jurisdiction is not invoked and the petition should be denied.

B. No real conflict exists between the Fifth Circuit's opinion and any opinion of this Court, or any other circuit.

Satterfield argues that the Court of Appeals' decision conflicts with this Court's opinion in *Chevron U.S.A. v. National Res. Def. Counsel*, 457 U.S. 837, 844 (1984). (Pet. for Cert. 20). There simply is no conflict. In *Chevron*, this Court addressed the question of "whether the EPA's decision to allow states to treat all of the pollution-emitting devices within the same industrial grouping as though they were encased within a single 'bubble' is based on a reasonable construction of the statutory term 'stationary source.'" *Id.* at 40. The Court stated:

> The power of an administrative agency to administer a congressionally created... program necessarily requires the formation of policy and the making of rules to fill any gap left, implicitly or explicitly, by Congress... If Congress has explicitly left a gap for the agency to fill, there is an express delegation of authority to the agency to elucidate a specific provision of the statute by regulation. *Such legislative regulations are given controlling weight unless they are arbitrary, capricious, or manifestly contrary to the statute.*

Id. at 843-44 (emphasis added). Satterfield focuses on the last sentence of the above quote to argue that § 825.303(b) is entitled to controlling weight and, because the Court of Appeals "declined to follow" § 825.303(b), it's opinion

conflicts with *Chevron*. Nothing could be further from the truth.

First, the quote from *Chevron* relied upon by Satterfield is taken out of context. Second, the Court of Appeals did not "decline to follow" § 825.303(b). Its holding is in no way inconsistent with the regulation, which requires that the employee "state that leave is needed." The point Satterfield evades is that she never stated that leave was needed, or anything close to such a statement which would place Wal-Mart on notice that leave might be needed. She merely called in sick, without a doctor's excuse, and her mother informed Wal-Mart that she did not know what was wrong. Therefore, the Court of Appeals' decision does not conflict with either § 825.303 or *Chevron*.

Next, Satterfield contends that the Fifth Circuit's resolution of her case conflicts with the Seventh Circuit's decision in *Price v. City of Fort Wayne*, 117 F.3d 1022 (7th Cir. 1997). (Pet. for Cert. 20-22). Again, there is no real, and certainly no intolerable, conflict between those cases. Part of Satterfield's argument in this regard is clearly misleading. For instance, she states: "[t]he Court of Appeals in the subject case holds that an employee seeking unforeseeable leave under the FMLA must provide her employer with additional information beyond simply that leave is needed." (Pet. for Cert. 21). This is not true. No reasonable reading of the Fifth Circuit's opinion would leave one with the impression that the Court was simply ignoring the plain language of the regulations and expressly requiring employees, when faced with an unforeseeable leave for need, to provide more information than that leave is needed. More accurately stated, the Court of Appeals concluded that Satterfield's notice was insufficient as a matter of law to reasonably apprise Wal-Mart that "leave was needed." The opinion raises no conflict whatsoever with the alleged "notice

requirement of the Seventh Circuit" in *Price* (i.e., that the employee need only state that leave is needed), which is identical to the regulation followed by the Fifth Circuit in this case.

Finally, the Fifth Circuit did not, as Satterfield suggests, shift the burden of obtaining and providing additional required information from the employer to the employee. Rather, the Court concluded that Satterfield's notice was legally insufficient to require Wal-Mart to make further inquiry before discharging Satterfield because the information provided could not lead any reasonable employer to suspect that an FMLA qualifying "serious health condition" might have been causing Satterfield's claimed illness.

Because there exists no conflict between the Court of Appeals' decision and any other decision of this Court or any circuit, the petition should be denied.

C. Other valid arguments Wal-Mart asserted in the Court of Appeals, but not reached by that Court, provide alternative grounds to allow this result to stand.

1. *There is no evidence Satterfield was suffering from a serious health condition on June 16, 1995.*

A serious health condition under the FMLA, is a condition that prevents an employee from performing the functions of her job. Family and Medical Leave Act, 29 U.S.C. §2612(a)(1)(D). It invokes either "in-patient care" at a hospital or a similar institution, or "continuing treatment by a health care provider." *Id.* at § 2611.

Here, there is no evidence that Satterfield was suffering from a serious health condition as defined by the FMLA prior to, or at, her termination. As noted previously, Satterfield implicitly concedes this point by stating in her second question presented that her illness subsequently developed into a serious health condition. Satterfield's own testimony establishes that she was not receiving inpatient care or continuing treatment by a health care provider when she missed work on June 16, 1995. (Tr. Vol. I, at 48, 52). In fact, the evidence indicates that Satterfield's condition on that particular day was not serious, as she did not attempt to contact Dr. Gurav's office for an appointment until right before he closed on June 16, 1995. (Tr. Vol. I, at 52). When Dr. Gurav's office informed Satterfield that the next available appointment was on June 20, 1995, she chose to wait five days to seek treatment. Additionally, she did not go to an emergency room. Satterfield was able to drive on June 16, 1995 and, in fact, drove to a pay phone. She did not see a health care provider as defined by the FMLA until June 20, 1995 for any medical condition for which she contended leave was required. (Tr. Vol. II at 339). Accordingly, Satterfield failed to establish that she was suffering from a serious health condition that would entitle her to FMLA leave at the time of her termination.

2. *Wal-Mart was justified in terminating Satterfield.*

Assuming, arguendo, that Satterfield could establish a prima facie case of discrimination under the FMLA, Wal-Mart has provided a legitimate, non-discriminatory reason for her termination: excessive unexcused absences. Satterfield's attendance record shows that she failed to show up for work on May 28, 29, and June 3, of 1995. (R. Ex. Tab 15). Satterfield admitted these absences were totally unrelated to any medical problems she had on June 16, 1995. (Tr. Vol.

I, at 119). Further, Satterfield acknowledged receiving the Wal-Mart Associate Handbook and Benefits Book which describes Wal-Mart's policies regarding attendance and how to request leave. (Def. Ex. 2). Finally, the exit interview expressly shows that Satterfield was discharged for three days unreported absences. (Def. Ex. 2). According to policy, Wal-Mart could have terminated Satterfield on June 3, 1995, because she had three unexcused absences. However, it elected to give her one more chance.

The issue is not whether Wal-Mart was correct in its belief that it was justified in terminating Satterfield, but whether it had a good faith reason for doing so. *Waggoner v. City of Garland*, 987 F.2d 1160, 1165-66 (5th Cir. 1993). The evidence clearly establishes that Wal-Mart had a non-discriminatory reason for discharging Satterfield.

3. *There is no causal connection between Satterfield's termination and her subsequent health problems.*

Additionally, to recover, Satterfield was required to establish that she was terminated "because" of her serious health condition. *See Oncale v. Sundowner Offshore Serv., Inc.*, 118 S. Ct. 998 (1998).

Satterfield failed to show up for work on May 28, 29, June 3 and 16 and Neighbors decided to terminate her. There is no evidence that when Neighbors decided to terminate Satterfield he knew she had a serious health condition. In fact, Satterfield's mother who also worked at the store and saw Neighbors on a regular basis, never told Neighbors that Satterfield was seriously ill. In addition, once the decision was made, but before Satterfield learned that she had been discharged, she had three additional unexcused absences. (Tr. Vol. I at 105). The only evidence of

discrimination is Satterfield's own subjective belief, which, of course, is insufficient. *Montgomery v. Trinity Indep. Sch. Dist.*, 809 F.2d 1058, 1062 (5th Cir. 1987). Here, there is no evidence that but for Satterfield's FMLA qualifying health condition she would not have been terminated.

Wal-Mart recognizes the importance of the FMLA; however, the statute should not be used by an employee who disregards an employer's reasonable work requirements relating to attendance and notification. Neighbors had no way of knowing Satterfield was attempting to use FMLA-qualifying leave. There is no evidence that Satterfield was under a doctor's care prior to her termination or that her medical condition prohibited her from working the day that she was terminated. The first time Satterfield notified Wal-Mart of any health condition was June 28, 1995, almost two weeks after she was terminated and more than one week after her first consultation with a physician regarding her condition. (Tr. Vol. I at 161). This, together with the fact that Satterfield did not notify Wal-Mart of the need to be absent from work, establishes that she never availed herself of a protected right under the FMLA and that no FMLA violation occurred.

Because there is no evidence to support the jury's verdict that Wal-Mart violated the FMLA, Wal-Mart is entitled to judgment as a matter of law regardless of whether the Court of Appeals correctly decided that Satterfield's notice was inadequate.

CONCLUSION

The Court of Appeals did not hold that employees like Satterfield must provide more notice than the fact that leave is needed. The Court of Appeals' decision does not conflict

in any way with *Chevron* or *Price*. Satterfield has not presented any significant issue in need of "settling."

For all these reasons, this Honorable Court should deny the petition for writ of certiorari.

Respectfully submitted,

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